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IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 1271

JAMES E. MARKHAM, Alien Property Custodian, and W. ALEXANDER JULIAN, Treasurer of the United States,

Petitioners,

vs.

HARTWELL CABELL,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This action was brought upon the authority contained in Subsection 9(a) of the Trading With the Enemy Act. That subsection, which was originally enacted as Section 9 of the Act, provides that "Any person • • • to whom any debt may be owing • • • may file • • • a notice of his claim • • • and the President • • • may order the payment • • • of the money • • • held." If the President does not order payment, the "said claimant may institute a suit in equity • • • to establish the debt so claimed and if so established the court shall order the payment • • • to which the • • • claimant is entitled."

In the District Court, a motion was made on behalf of the petitioners here (defendants below), to dismiss the amended complaint upon four grounds as follows:

"(a) The amended complaint shows that the alleged debt upon which plaintiff's claim is based was not owing to or owned by the plaintiff prior to October 6, 1917, as required by Section 9(e) of the Trading With the Enemy Act, as amended;

(b) The amended complaint discloses that a notice of the alleged claim could not have been filed or an application made with respect thereto prior to the date of the enactment of the Settlement of War Claims Act of 1928, as required by Section 9(e) of the Trading With the Enemy Act, as amended;

(c) The remedies provided by Section 9 of the Trading With the Enemy Act, as amended are not applicable to any action which may have been taken by the Alien Property Custodian under Section 5(b) of the said Act, as amended by Title III of the First War Powers Act, 1941; and

(d) The plaintiff has not exhausted the administrative remedies available to him with respect to any action which may have been taken by the defendants, or either of them, or with respect to any claim which may have arisen out of any such action."

At the hearing upon this motion, counsel for the defendants informed the Court that grounds (c) and (d) would not be insisted upon and might be considered as withdrawn, and the argument was limited to the first two grounds, *i. e.*, the effect of Subsection 9(e) of the Act as amended, upon the rights of creditors of an enemy whose property had been taken over by the Alien Property Custodian during the present war.

The District Court granted the motion and dismissed the amended complaint. The Circuit Court of Appeals unanimously reversed the decision of the lower court, and

sustained the right of plaintiff below to maintain his action. The Circuit Court of Appeals held that where an amendment is clearly intended to apply only to seizures during the first World War, it must be so construed and should be disregarded when necessary in order to give effect to the permanent provisions of the Statute. On this point in the course of his opinion Judge LEARNED HAND said:

> "If we do not so read it the result is really nonsense, for the remedy given in Subdivision (a) which is prospective, is completely defeated by Subdivision (e). Nobody can seriously believe that a general plan designed to be successively suspended and revived, as peace and war should alternate, was meant to be permanently mutilated by a statute of limitation expressly made applicable to only the first of its phases. The defendants have no answer except to say that we are not free to depart from the literal meaning of the words however transparent may be the resulting stultification of the scheme or plan as a whole.
>
> Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter when it frustrates the patent purpose of the whole statute. We need cite no others than the more recent of those in the Supreme Court which have followed, *Holy Trinity Church* v. *United States*, 143 U. S. 457."

Argument

The plaintiff (respondent) rested his case in the courts below upon the fundamental rule governing the construction of statutes which has been repeatedly announced and adhered to by this Court. That rule construes the duty of the Court to be to ascertain and give effect to legislation, but that where adherence to the strict letter of a statute would lead to injustice, absurdity or to contradictory provisions, it is the duty of the Court to ascertain the true meaning and intent of a statute and be guided thereby in

its decisions. The opinion of the Circuit Court of Appeals (Transcript, p. 26) cites a number of these authorities. We quote from several of them.

The *Holy Trinity Church* v. *United States*, 143 U. S. 457, has generally been considered the leading case on the subject. There Trinity Church (incorporated) had entered into a contract in England with one E. Walpole Warren, a clergyman resident of England, whereby he was to remove to the United States and become the Rector of Trinity Church. There was a statute in existence at that time forbidding the importation and immigration of foreigners under contracts or agreements made abroad to perform labor in the United States. The government sued to recover the penalty prescribed by the Act and the Circuit Court sustained its contention.

The Supreme Court unanimously reversed the Circuit Court in a decision by Justice BREWER. He said in part:

> "It must be conceded that the act of the corporation is within the letter of this section. * * * It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

In *Ozawa* v. *United States*, 260 U. S. 178, the Court had before it the construction of a statute controlling the naturalization of foreigners. The Court in an opinion by Mr. Justice SUTHERLAND said (p. 194):

> "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

In *Fleischmann* v. *United States,* 270 U. S. 349, the Court, in construing a statute known as "The Materialmen's Act," said:

> "The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. (Citing *Holy Trinity Church* v. *U. S.,* 143 U. S. 457, and *Ozawa* v. *U. S.,* 260 U. S. 178), and unjust or absurd consequences are, if possible, to be avoided."

In *U. S.* v. *Katz,* 271 U. S. 354, the Court said in construing a criminal statute:

> "General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation." (Citing cases.)

One of the recent decisions of this Court on this point is *United States* v. *American Trucking Corporation,* 310 U. S. 534 (1940). From the opinion of Mr. Justice REED (pp. 542-3), we quote the following:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery

of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act." (Citing *Taft* v. *Commissioner*, 304 U. S. 351, 359; *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89; *Wilbur* v. *U. S.*, 284 U. S. 231, 237; *Crooks* v. *Harrelson*, 282 U. S. 55, 60; *U. S.* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278; *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253; *Caminetti* v. *U. S.*, 242 U. S. 470; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 199.)

The minority of the Supreme Court in that case voted for affirmance of the Court below "for the reason stated in the opinion of the District Court, 31 Fed. Supp. 35." The syllabus of the decision in the Circuit Court of Appeals (Paragraph 5) restates the rule as follows:

"Statutes will be annulled by construction only where effect of giving words their clear meaning would offend the moral sense or involve injustice, oppression or absurdity."

That Court held, however, that in the case before them, no injustice, oppression or absurdity was involved; and the minority of this Court concurred.

Counsel for the petitioners in the case at bar frankly admit that "it is true that the limiting language of Section

9(e) was adopted with reference to property vested during the last war" (Petition, p. 7). Nowhere in their petition is the rule of statutory construction, laid down in the authorities above quoted and upon which we rely, questioned.

To avoid application of the rule in this case a curious argument is resorted to. On page 7 of the Petition for Certiorari, in commenting upon 9(e) our opponents say:

> "But the conclusion is nevertheless inescapable that the device employed by Congress to effectuate that limitation, operated by its terms to deprive the general language of Section 9(a) of the continuing vitality it would otherwise have had."

And again on page 15:

> "The inescapable conclusion is that Congress acted upon the assumption that the creditor's remedy provided in Section 9(a) had been withdrawn by 9(e). We submit that any doubts in the construction of Section 9(e) should be resolved to support rather than defeat the unmistakably indicated policies of Congress."

The amendments of Section 9 of the Trading With the Enemy Act which include Subsection 9(e) (Subsections (b), *et seq.*), were adopted in June, 1920, nearly two years after the end of World War I. An examination of these amendments will indicate clearly that their principal purpose was to extend the rights of recovery against property seized during the first World War to classes of claimants not included in the law as originally enacted. These new classes, for example, gave the right of recovery against property in the hands of the Alien Property Custodian, of women who had been born in neutral countries, but had married Germans. Another class gave the right to recover their property, to enemies who had been interned in this country. Diplomatic representatives of enemy countries or their allies, also were given certain rights and exemptions, and there were a number of other classes.

By Subsection 9(e) as originally enacted, it was provided that no return of property or debts should be allowed thereunder "unless it was owing to or owned by claimant prior to October 6th, 1917" (the date of the enactment of the original Trading With the Enemy Act).

Several further amendments of Subsection 9(e) were enacted and became law in the years 1921-2. These amendments extended the times within which suits against the Alien Property Custodian and Treasurer could be brought for the purpose of enforcing rights against the property seized. By the Settlement of War Claims Act of 1928, the period within which suits could be brought after the end of the war, which by the amendment of December 27th, 1922, of Subsection 9(e), had been extended to thirty months, was deleted, and the subsection was further amended to allow recovery for debts if owing to and owned by the claimant prior to October 6th, 1917. The right to sue was further limited in this last amendment to apply only to debts as to which notice of claim had been filed or application therefor had been made prior to the enactment of the Settlement of War Claims Act of 1928. It is this last amendment which is relied upon by our adversaries as, in effect, destroying Subsection 9(a) of the Trading With the Enemy Act.

In the first place it is to be borne in mind that the Trading With the Enemy Act was intended to be, and is, an integral part of our general law. The intention was that the law should control not only as to the war then in progress but as to future wars that might occur. Thus, the Congress in 1941 in granting to the President broader powers over foreign owned property than those given by Section 7 of the original Act (Title III, First War Powers Act) did so by way of amendment to Section 5 of the original Trading With the Enemy Act. The President in his preamble to Executive Order No. 9095 (March 11th, 1942)

whereby the Office of the Alien Property Custodian was reestablished, declared that:

> "By virtue of the authority vested in me by the Constitution, by the Trading With the Enemy Act of October 6th, 1917, as amended, by the First War Powers Act, 1941, and as President of the United States, it is hereby ordered as follows:"

Similar references clearly recognizing the Act as a part of the general law of our country, will be found in other Presidential Proclamations issued during the present war.

The Settlement of War Claims Act of 1928, which included the last amendment of Subsection 9(e) of the Trading With the Enemy Act was, on the contrary, clearly intended not as a general law but a special statute which was to control the disposition of the property taken over by the Alien Property Custodian during World War I.

In *Banco Mexicano* v. *Deutsche Bank*, 289 Fed. 924, the Court of Appeals of the District of Columbia held that Subsection 9(a) (Section 9 of the Act as originally passed), "is an *enabling* enactment granting certain remedies to certain parties, while Subsection (4) is a *limiting* or *restrictive* enactment designed to cut down the provisions of Subsection (a)." (Emphasis ours.) Does it not logically follow that if limitations or restrictions imposed by 9(e) are held not to apply in a given case such as this, the enabling stature must be given full force and effect?

In their petition to this Court for a Writ of Certiorari our adversaries lay great stress upon the amendment to Section 5 of the Trading With the Enemy Act by the First War Powers Act whereby the powers of the President as to seizure of property is extended to include any property in which any foreign country or a national thereof has an interest, coupled with the further power to use, administer, liquidate, sell or otherwise deal with the same in the interest of and for the benefit of the United States.

It is to be borne in mind that this power to seize and deal with alien property granted under the amendment of Section 5(b) is not confined to war times, but may be exercised during any other period of "national emergency." It is further to be noted that it extends to all property belonging to any national of a foreign country, whether an enemy or neutral or even an ally. The term "national" is given an exceedingly broad definition in the Act itself.

Section 5(b) as amended by the First War Powers Act contains no remedial provisions and the only section of the Trading With the Enemy Act providing any remedy to a person whose property has been wrongfully seized, is contained in Subsection 9(a). Section 9 as originally enacted, contained the following provision:

> "Except as herein provided the money or other property conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any Court."

In later amendments this language was transferred to Subsection 9(f).

In *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, it was held that the dominant purpose of the Trading With the Enemy Act was to give to citizens and alien friends adequate remedy for invasion of their property rights in the exercise of war powers by the Government. The Court held in that case that a statute giving to a non-enemy a remedy for the seizure of his property as a war measure must be broadly construed to give effect to its remedial purpose.

In *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479, the Circuit Court of Appeals of the Second Circuit, held that:

> "If persons not alien enemies or allies of alien enemies were given no means to protect their interests in such property, the seizure would be unconstitutional as without due process of law; but they are given such remedies under Section 9."

This decision was affirmed by this Court (*Central Union Trust Co.* v. *Garvan*, 254 U. S. 554).

Several of the lower courts have considered this question. In one of these cases (*Draeger Shipping Co.* v. *Crowley*, 49 Fed. Supp. 215), Judge BONDY in that case said:

> "The First War Powers Act, 1941, itself does not provide any remedy whatsoever for the return of property erroneously seized as property of a national of a foreign or enemy country. If construed as unaffected by Section 9(a), it would depend upon the will of the President or his representative whether there should be even an administrative remedy and if so what it shall be.
>
> Notwithstanding that the Trading With the Enemy Act of 1917 was a war measure, the seizures by the Alien Property Custodian under it before the 1941 amendment were held to be constitutional only because adequate remedies were provided by the Act for a return of the property or its proceeds in case the property was erroneously seized." (Citing *Stoehr* v. *Wallace*, 255 U. S. 239; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554.)

If the argument advanced herein that Subsection 9(a) has been practically abrogated by Subsection 9(e) is sustained, then it follows that the owners of property seized by the Alien Property Custodian under Section 5(b) are absolutely without remedy.*

* An interesting sidelight upon the argument advanced in this case that by reason of the enactment of 9(e) Subsection 9(a) has ceased to exist, is to be found in two articles dealing with the constitutionality of Section 5(b) of the Trading With the Enemy Act as amended by the First War Powers Act, pub-

Considerable space is devoted in the petition for certiorari to warning this Court of the volume of litigation against the Alien Property Custodian under Section 9(a) which would result in a refusal of the writ, and of the elaborate machinery which would have to be set up to take care of such litigation. Also it is urged that such a ruling would result in priorities and inequities in the distribution of seized property where the claims against it should total more than the value of the property.

As to the first argument, it is to be observed that we have here the question of the legislative intent in the enactment of certain laws. The insistence that such intent, if found to exist, should be ignored, because it would result in a multiplicity of suits, and the increased expenses thereby incurred is, it is submitted, a rather obvious *argumentum ad hominem.*

As to the second, from time immemorial the vigilance of a citizen in protecting his rights has been epitomized in our courts by the old saying "First come, first served." There is nothing in these statutes as they now read to authorize the Alien Property Custodian to treat property seized by him as analogous to a bankrupt estate, and to

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lished in Duke University Law Periodical "Law and Contemporary Problems," Volume XI, No. 1. The first article (p. 135) is by Mr. George A. McNulty, who, until recently as Special Assistant to the Attorney General, was Chief of the Alien Property Custodian unit in the Department of Justice. The second article is by Mr. Herbert Wechsler, Assistant Attorney General in charge of the War Division of the Department of Justice. In both articles, for the purpose of sustaining the constitutionality of Section 5(b) Subsection 9(a) is treated as being still in full force and effect. In Mr. Wechsler's article (p. 149) which is in effect a criticism of doubts expressed by Mr. McNulty as to the constitutionality of Section 5(b) when applied to the property of Americans and non-enemy aliens, we read:

> "It may be, therefore, that the substantive powers conferred by Section 5(b) may be divorced in various respects from the limitations upon similar powers as they are embodied in other provisions of the Trading With the Enemy Act. But the history of the legislation is completely silent with respect to the problem of remedies. I read this to mean that Congress delegated such powers as it did against the background of traditional remedies, including the remedy for unauthorized seizure provided by Section 9(a) in terms which do not restrict its continuing vitality."

retain the same, thereby delaying diligent creditors, until, in course of time, all claims may be ascertained and a proper distribution made.

We have here a simple question as to the meaning of certain statutory enactments and their interrelation. The purpose of Congress in enacting 9(e) was as our adversaries admit, to limit its application "to property vested during the last war" (Petition, p. 7). In the face of this admission the argument that its effect as to seizure of property during World War II is to render null and void Section 9(a) of the Act, wherein the sole remedy to owners of property seized and of creditors, is provided for, is, to say the least, rather fantastic.

From the standpoint of the Government itself, since 9(a) is the only remedial section contained in the Act, and because of the provision in the Act (Section 9(f)), that the only relief to non-enemy owners and creditors against property seized or vested by the Alien Property Custodian shall be that provided in the Act itself, this argument if sustained will give rise to a serious condition. It would open the way for attacking every vesting or seizure of non-enemy property during World War II upon the ground that the law as it stands is unconstitutional under the due process clause of the Constitution.

CONCLUSION

It is submitted that the petition for writ of certiorari should be refused.

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